Delta Hosiery, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. Cases 4-CA-11161, 4-CA-11278, and 4-CA-11442

January 8, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 12, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Delta Hosiery, Inc., Wilkes Barre, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent, Charging Party, and General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Member Jenkins would compute interest in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees about their union sympathies or those of other employees.

WE WILL NOT refuse to employ employee applicants because of the union sympathies of their relatives.

WE WILL NOT threaten employees with loss of employment or the closing or moving of our facilities because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL make Michele Evans whole for any loss suffered by reason of our discrimination against her, with interest, and offer her immediate employment in the same position she would have been employed absent such discrimination.

DELTA HOSIERY, INC.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on March 3, 4, and 5, 1981, in Wilkes Barre, Pennsylvania. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by threats and interrogations made by agents of Respondent and violated Section 8(a)(3) and (1) of the Act by laying off one employee for 4 days, by refusing to hire an employee and by "constructively" discharging another for discriminatory reasons. The complaint also alleges that the Charging Party (hereafter the Union) had obtained signed authorization cards from a majority of Respondent's employees and that, because of its unfair labor practices, Respondent's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act and required a bargaining order remedy. Respondent denied the essential allegations of the complaint. All parties filed briefs which were received on or about June 1, 1981.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation, is engaged in the packaging of hosiery at its facility located at 100 S. Pennsylvania Boulevard, Wilkes Barre, Pennsylvania. During a representative 1-year period, Respondent had gross revenues in excess of $500,000 and purchased goods and services valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent employs some 53 employees, most of whom fold and package hosiery which is manufactured elsewhere and sent to Wilkes Barre for packaging. During the winter, Respondent's facility operates between 8 a.m. and 6 p.m., Monday through Friday, and 8 a.m. to 3 p.m. on Saturday. During the summer, it operates between 8 a.m. and 4:30 p.m., Monday through Friday, with no work on Saturday. In addition to regular full-time employees, Respondent employs high school students who work part-time on the so-called night shift during the school year, that is, 3 p.m. to 6 p.m. on weekdays and a full day on Saturday. At all material times until his death in the autumn of 1980, the plant manager in charge of the Wilkes Barre facility was Jim Murdock. Until Jim Murdock's death, his son, George, was a supervisor in charge of the shipping and receiving department. George Murdock became plant supervisor upon his father's death. In addition, Respondent's work force included two senior employees, Helen Javick and Mary Goff, who were identified as floor ladies. The floor ladies basically separated stock when it arrived at the facility and distributed it to other employees for folding and packaging. Most, but not all, of the folding and packaging was performed upstairs on the second floor. The material arrived on the first floor where it was separated and placed on a conveyer leading to the second floor. The floor ladies and Murdock had desks on the first floor of the facility. Respondent has no job classifications because all jobs are interchangeable, except perhaps that of Carol Gross, an employee who operates a printing machine on the first floor.

The General Counsel does not allege that floor ladies Mary Goff and Helen Javick were supervisors of Respondent within the meaning of Section 2(11) of the Act. He entered into a stipulation with Respondent that they were included in the bargaining unit of 53 employees. He nevertheless alleged in his complaint that Goff and Javick were agents of Respondent and that Respondent was liable for certain statements made by them to employees. The evidence shows that the floor ladies transmitted orders, warnings, and complaints about low production from Jim Murdock to other employees, distributed work to them and instructed new employees on how to do their jobs. They also occasionally sent people home if there was no work and handled sick leave requests, although it is not clear that they had independent judgment in these matters. They certainly did not responsibly direct employees within the meaning of Section 2(11) of the Act.

The evidence reveals that Jim Murdock supervised Respondent's operation very closely and the employees were well aware of his close supervision. For example, Desiree Evans testified at length about his expressed concern over her production and her absenteeism. She also testified that he gave her permission to take time off because of vacation and illness. Jim Murdock also warned other employees about their production and moved employees because they were "talking." Thus, while it appears that for some, but not all, purposes Goff and Javick were agents of Respondent, they were not supervisors and utilized little, if any, independent judgment in carrying out their functions.

B. *The Union Campaign*

After some initial contacts from employees, the Union arranged for a meeting of Respondent's employees on May 20, 1980, at a Wilkes Barre hotel. Fifteen employees attended. A union representative, Ted Gatto, passed out an information leaflet to employees and explained their rights under the Labor Act. He then distributed union authorization cards and read aloud the content of the cards. All 15 employees signed the cards. At the meeting, the employees elected an organization committee composed of employees Louise Groner, Jeanne Strausser, Cindy Walkowiak, Desiree Evans, Sharon Ridinger, and Suzanne Evans.

By May 22, about 30 employees had signed cards. At least eight of these cards were secured through the solicitations of Louise Groner and Suzanne Evans. They talked to employees in the parking lot of Respondent's facility, at a Mr. Donut Shop nearby, and in a restroom inside the facility.

On May 28, the Union sent a mailgram to Respondent informing it that a majority of its employees had designated the Union as bargaining representative and requesting recognition and bargaining. This mailgram was received by Respondent the same day. Respondent never replied to the mailgram although it apparently did file an election petition with the Board which was dismissed because of the initiation of these proceedings.

C. *The Alleged Misconduct of Goff and Javick*

At about 2:30 p.m. on May 28, Mary Goff approached employees individually at their work stations and asked them what they thought about supporting a union. She carried a piece of paper with her which contained the employees' names on it and columns designating prounion or antiunion. She marked the paper after receiving responses from the employees. Goff gave no reason for the inquiries and no assurances against reprisals. When she finished her poll, Goff joined Jim Murdock and

Helen Javick who were standing at one end of the upstairs room in which the employees worked. Goff showed the paper to Murdock and they went downstairs together.[1]

Jeanne Strausser testified that when Mary Goff approached her and Cindy Walkowiak on the afternoon of May 28, in addition to inquiring about their union sympathies, she stated that "she did not want a union, and if there was any indication of a union, New York was going to close the plant." The testimony was uncontradicted since Mary Goff did not testify in this proceeding. Walkowiak did testify but was not questioned on this matter. I credit Strausser who testified in a clear and straightforward manner and survived vigorous cross-examination.

Employee Carol Gross testified that, on May 28, she told Mary Goff that she supported the Union. Goff also talked to her 1 or 2 days later. She asked whether Suzanne Evans or Louise Groner had approached her about the Union. Gross said it was Groner. Goff also said that she had determined that there were only seven employees who supported the Union and she asked Gross if she knew the names of the people who supported the Union. Gross said she did not, but stated she thought there were more than seven and that about 90 percent supported the Union. According to Gross, Goff said, "the big boss said if this union gets in, they're moving out." Gross was cross-examined thoroughly by counsel for Respondent but was not questioned about this conversation. Gross' testimony about Goff's remarks concerning the moving of the facility was in effect corroborated by Strausser who testified that Goff mentioned this subject to her on May 28. Although I found Gross unreliable in other parts of her testimony, her testimony about the Goff encounter was reliable and it was compatible with other testimony concerning Goff's approach to employees about the Union.

Employee Andrea Chvera testified that Helen Javick approached her at her work table on June 9 and asked her if "anyone had asked me about the union." She said no. Javick then asked if Louise Groner "didn't nab me yet." She said no. Javick then asked what she thought about the Union and Chvera said "I don't know." Javick also asked Chvera how her sister felt about a union and Chvera told Javick to ask her, which she did. Javick asked Patricia Chvera if she knew anything about the Union and Patricia said she did not. Javick then walked away. Employee Bonnie Zadora testified that Javick also asked her if anyone had approached her about the Union. She said no, and Javick asked if Zadora knew "what they were offering" and then she said "they hadn't approached her either."

The next day, according to the testimony of Zadora and Theresa Allabaugh, Javick approached a group of employees while they were on break. She asked if they knew what the Union was offering. The response was that the employees did not know. She asked whether they would all stick together and vote no and the employees said they would. Javick also said she did not know why anyone would want a union because the employees had paid vacations and holidays. She also said "if the Union got in, that we would have to start from scratch."

According to Suzanne Evans, on June 10, Javick saw her in the restroom and asked if she was "involved with the Union." Evans said yes. Javick asked if another employee was involved and Evans said she did not know. Javick then said, "why don't you go to Jim for a raise and I said, you know, I didn't know."[2]

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by virtue of interrogations and threats by Mary Goff and interrogations by Helen Javick. As I have indicated, the General Counsel does not allege that Goff and Javick are supervisors. Indeed, he stipulated that they were properly members of the bargaining unit in this case. He does allege, however, that they were agents of Respondent and that Respondent was thus responsible for their conduct and statements which he further alleges were violative of the Act.

An employer may be liable for the acts of nonsupervisory employees who act as his agents. See *International Association of Machinists, Tool and Die Makers Lodge No. 35 [Senick Corp.]* v. *N.L.R.B.*, 311 U.S. 72, 80–81 (1940). It is settled that where an employer places a nonsupervisory employee in a position in which employees could reasonably believe he speaks for management, the employer may be responsible for the coercive statements of that employee. *Edgar L. Landen t/a Speed Mail Service*, 251 NLRB 476–477 (1980). The critical issue is "whether under all the circumstances, the employees would reasonably believe that the non-supervisory employee was reflecting company policy and speaking and acting for management." *Community Cash Stores, Inc.*, 238 NLRB 265 (1978). Another factor to be considered in determining employer responsibility in this case is that the two alleged agents, Mary Goff and Helen Javick, were stipulated to be unit employees and not alleged to be supervisors within the meaning of the Act. In analogous circumstances—where individuals are included in a bargaining unit or permitted to vote without challenge in a Board election and they are later found to be supervisors—the Board finds an employer responsible for the acts and statements of such supervisors only where the employer encourages, authorizes, or ratifies the supervisors' activities or "acted in such a manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management." *Hy Plains Dressed Beef, Inc.*, 146 NLRB 1253, 1254 (1964).

In applying the above principles, I find that Respondent is responsible for the conduct and statements of Mary Goff, but is not responsible for the conduct and statements of Helen Javick. In addition, I find that the alleged misconduct of Javick was not coercive within the meaning of Section 8(a)(1) of the Act.

Goff's polling of employees on May 28 was clearly viewed by employees as an act of management and management itself acquiesced in her conduct. Goff, who was certainly an agent for transmitting orders from Jim Mur-

[1] The above is based on the uncontradicted and mutually corroborative testimony of several employees.

[2] The above was based on uncontradicted testimony since Javick was not called as a witness.

dock and for assigning work, made a systematic poll of employees about their union sentiments. Jim Murdock was present and visible to employees at least when Goff finished her poll because she brought the paper with the results of the poll to Murdock and they walked away together. Thus, because of the circumstances of the poll, Goff's general authority as a floor lady, and the presence of Jim Murdock, it is clear that Respondent, through Murdock, authorized—or apparently authorized—and ratified Goff's polling of employees. The poll itself was unlawful because Goff did not explain its purpose and did not give assurances against reprisals. Some of the employees gave obviously untruthful or evasive answers. The poll was thus coercive and violative of Section 8(a)(1) of the Act. In addition, Goff's inquiries of Carol Gross 1 or 2 days later about whether Groner or Suzanne Evans had approached her were also unlawful. Gross, who had been polled on May 28, obviously regarded Goff in the same light during the individual interrogation as she had in the earlier one because management had authorized or ratified Goff's role during the May 28 questioning. Thus, this interrogation was also coercive.

The General Counsel also alleges as unlawful Goff's remarks to Strausser on May 28 and to Gross 1 or 2 days later to the effect that Respondent would close or move the plant. Although, at first blush, it might appear that Goff would not be privy to such management decisions in her limited capacity as a floor lady, the fact that Respondent authorized and ratified Goff's role in polling employees imbued her, in the minds of employees, with special competence in reflecting the views of management on the union effort. This is particularly so with respect to the remark to Strausser because it was made during the May 28 poll. The remark to Gross was made 1 or 2 days later also during an interrogation. When Goff spoke about unions, employees listened. No explanatory business reasons or reasons beyond the control of the employer were given for the economic holocaust which would eventuate if the employees selected a union. Thus, Goff's remarks about the closing or moving of the facility were coercive and violative of Section 8(a)(1) of the Act.

In contrast, I do not believe that the employees who participated in the alleged unlawful conversations with Javick could reasonably believe that she spoke for management or was reflecting management policies. First of all, she, like Mary Goff, was not a supervisor and was stipulated to be an employee in the bargaining unit. She was therefore entitled to participate in discussions about the Union and to convince other employees or to be convinced by others when it came to support or rejection of the Union. Secondly, unlike Mary Goff, Javick was not intimately connected with a systematic poll of employees which was obviously ratified and authorized by Jim Murdock. Her inquiries and statements to employees took place some 2 weeks after Mary Goff's poll. Finally, the Javick inquiries themselves were not made in the context of coercing or in circumstances that would indicate that Javick was speaking for management. Rather she spoke as if she was a fellow employee sharing her views—albeit antiunion views—with others. Thus, she asked Andrea Chvera if Louise Groner, a union supporter, had "nabbed [her] yet" and she told Zadora that "they," meaning the union supporters, had not "approached her either." Her remarks to a group of employees on break are likewise innocuous. She simply asked what the Union was offering, asked whether they would stick together and vote no—apparently the election petition had been filed at this point—and gave her view as to why a union was not necessary. She also made the remark that if the Union came in "we would have to start from scratch." The General Counsel argues that this statement is coercive. I disagree. First of all, there was no suggestion on the part of Javick that existing benefits would be taken away by Respondent and that bargaining would begin from scratch. It is in this context that bargaining from scratch statements may be viewed as coercive. Without evidence from which such an inference could be made, the remark is ambiguous and noncoercive. Secondly, and more importantly, there is no evidence that Javick had any authority to rescind benefits or would have any voice in collective bargaining on Respondent's behalf. Nor would her relatively low status as an agent of Respondent for transmitting orders and assigning work create in the minds of employees the impression that she spoke with authority in these matters. In these circumstances, I consider Javick's remarks to have been her personal opinion as an employee and I believe they were regarded as such by other employees. Accordingly, I shall dismiss the allegation that Respondent violated Section 8(a)(1) of the Act by virtue of Javick's questioning of employees.

D. *The Alleged Misconduct of Jim and George Murdock*

Employee Carol Gross testified that, on June 18, Jim Murdock approached her and said, "if this union gets in, that's going." He pointed to the printing machine Gross worked on, and said "if you can find another job, you better take it, because I don't want to see you get hurt by all this. And then he started to walk away and he turned around and said, I'm pretty sure have them beat by at least 15 votes, but you never can tell, so I just thought I would tell you." After counsel for Respondent tried unsuccessfully to impeach Gross' testimony by reference to her pretrial affidavit, Gross explained that she made the same statement in the affidavit that she did on the witness stand. Gross remained firm about Jim Murdock's remarks despite vigorous cross-examination. I credit Gross' testimony on this point and find that Jim Murdock's remarks amounted to a threat that there would be a loss of work if the Union won representation rights. This was violative of Section 8(a)(1) of the Act.

Carol Gross also testified that, at some indeterminate time "from October up until last month [February 1981]," George Murdock, who had taken over his father's job after the latter's death, accused the Union of having caused his father's death and said that he was going to "press charges against . . . the Union and everybody who pressed charges against Jim." He said that "when this was all over, he intended to swing a big axe and he didn't get mad, he got even." He also said that if

there was anyone "looking for a job, they should come in to fill out applications because when this was over, there was going to be a lot of tables to be filled." According to Gross, there were three or four other employees present when these statements were made. However, none of these people corroborated Gross.

On cross-examination, Gross, for the first time, separated Murdock's remarks into two conversations. The first—the swinging the axe remark—she identified as having occurred "probably" in January 1981. She said the remark was made to all four employees who had been talking about the "people upstairs" who were identified as "weird." Murdock said he could not stand them, and, according to Gross, he mentioned swinging an axe in connection with the people upstairs who had been referred to as "weird." Gross testified that, in this conversation, the word "union" was not mentioned.

The second remark, according to Gross' testimony on cross-examination, was made in February 1981. Even on cross-examination, however, Gross was unable to specify dates. She also testified that, in these remarks—that people should fill out applications when "this was over" because there were "going to be a lot of tables to be filled"—the word "union" was not mentioned.

I do not credit Gross' testimony on the alleged George Murdock threats even though it was not contradicted. Gross' testimony on this aspect of the case—as it was on the Desiree Evans allegation discussed later in this Decision—was vague and unreliable. Gross was unable to pinpoint the dates or times of the alleged conversations. Her testimony on direct conflicted with her testimony on cross-examination. Moreover, she was not corroborated even though she identified three or four other employees who were allegedly present when George Murdock made his remarks. Significantly, Gross kept notes of other conversations about the Union she had with officials of Respondent but failed to do so with respect to the conversations with George Murdock. This might well explain her vague testimony on some issues in this case. Gross testified in such general terms about the context of the alleged George Murdock conversations and the date or dates of the conversations that I am unable to credit her testimony. In these circumstances, and because George Murdock was not accused of unfair labor practices by any other employee, I cannot credit Gross' uncorroborated testimony on this issue.

Employee Sharon Wojcik testified that, at about 2:20 p.m. on the afternoon of May 28, Jim Murdock approached her and asked her if she had signed a union card. She said she did not know anything about a union. She also testified that he said "That's okay because the big boss wouldn't go for it and he would close and move to Reading." She testified that she understood the "big boss" to mean one of the owners of Respondent from New York. Wojcik also testified that employees Ridinger and Desiree Evans were present during this conversation. However, neither of these employees—both of whom testified in this proceeding—corroborated Wojcik. Indeed, Evans testified that Murdock did not talk to her between May 28 and September 9 about the Union. Although Wojcik testified that Murdock talked to her and not Evans, it seems likely that if a threat to close the plant had been made in the presence of Evans she would have testified about it. Moreover, I find it highly unlikely that Murdock would have approached a group of three employees to question one of them 10 minutes before Mary Goff went around to poll employees in circumstances which clearly showed he wanted to insulate himself from the polling. Finally, I perceived in Wojcik a personal animosity towards Murdock because he frequently complained to her, through Helen Javick, about her low production, particularly in the summer of 1980 shortly before his death. In these circumstances, I do not credit the uncorroborated testimony of Wojcik and I shall dismiss any alleged violations based solely on her testimony.

E. *The Failure To Hire Michele Evans*[3]

Michele Evans, the sister of employee Desiree Evans, applied for work at Respondent's facility on Tuesday, May 27, 1980. She spoke to George Murdock. He told her he would call her some time that week. That day, Helen Javick talked to Desiree and told her that Michele had been hired and that she was to tell Michele to come to work on Thursday. That same day Jim Murdock approached Desiree. He asked whether Javick had talked to her about Michele and confirmed that Michele was hired. He told Desiree to tell Michele to report on Thursday.

Desiree also testified that Goff approached her on the afternoon of May 28. She testified as follows:

> Mary Goff, the floor lady had approached me and asked me if I knew anything about the Union and I told her no and then she asked me would I like to have a Union—like did I sign a union card and I asked her do I have to give you an honest answer and once again, she said would you like to have a union and I said, sure, why not.

A question mark was placed after Desiree's name on the poll. Desiree also testified that, a few minutes after Mary Goff and Jim Murdock went downstairs, they returned, and Jim Murdock approached her and "asked me if Michele was still coming in Thursday and I said yes. He told me to tell her not to come in and he said that there were other girls waiting ahead of her."[4]

The General Counsel alleges that Respondent's reversal of position and refusal to hire Michele Evans was based on her sister's possible union sympathy and was thus discriminatory. I agree. An employer's refusal to hire an applicant based on the union activity of a relative has been found to be violative of the Act. See *Copes-Vulcan, Inc.*, 237 NLRB 1253, 1257 (1978), enfd. in pertinent part 611 F.2d, 440, 442 (3d Cir. 1979).

In the instant case, the uncontradicted evidence establishes a *prima facie* case of a violation. On May 27, Desiree Evans was told by Jim Murdock and by Helen

[3] The General Counsel submitted a motion to correct the transcript in certain respects, including an erroneous identification of Michele Evans as Cheryl Evans. The motion was unopposed. I hereby grant the motion and correct the transcript.

[4] The above reflects the transcript as corrected.

Javick that her sister, who had been interviewed that day for a job with Respondent, was hired and that she should report for work on Thursday. The next day, Respondent received the Union's demand for recognition and, through Mary Goff, polled employees concerning their support of the Union. When Goff approached Evans, Evans indicated to her that she might support the Union. A question mark appeared next to her name. Goff showed the results of her poll to Murdock and, shortly thereafter, Murdock told Evans that her sister should not report for work. The timing of Respondent's change of position makes it likely that the reason for failing to hire Michele, after Respondent indicated the day before that she had been hired, was her sister's possible support of the Union and Respondent's concern over the Union's professed majority status and request for recognition. Although the issue is a close one, I am constrained to find that Respondent either did not want another employee who, like her sister, might support the Union or wanted to exert some pressure on Desiree to reject the Union. The evidence was sufficient to require Respondent to rebut the natural inference of illegality which flowed from the facts presented by the General Counsel. Respondent submitted no evidence on this issue, even though George Murdock, who had interviewed Michele, did testify, and Helen Javick, who transmitted Jim Murdock's decision that Michele had been hired, and Mary Goff, who spoke to Murdock just before he told Desiree Evans that Michele should not report for work, were still employed by Respondent. In these circumstances, I find that Respondent's failure to hire Michele Evans after it had made a decision to hire her and have her report for work was discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act.

F. *The Layoff of Colleen McGrady*

The General Counsel alleges that Respondent unlawfully laid off employee Colleen McGrady from May 28 until June 2, 1980, because of her union activities. There is a paucity of evidence concerning McGrady's union activities or any animus directed to McGrady. McGrady, who was a high school student, worked from 3 to 6 p.m. on weekdays and from 8 to 3 on Saturdays. She had signed a union card on May 22. Other employees working part time along with her had signed cards and later changed their minds after talking with their parents. On May 27, McGrady overheard Helen Javick talking to an employee with whom McGrady had previously spoken about the Union. According to McGrady, Javick told that employee, "there is no way of stopping it, all they could do was wait and see what would happen." On May 28, the next day, Javick called McGrady's school and left a message for her not to come to work that day. This was the normal procedure by which Respondent got in touch with high school students who worked part time. McGrady called Javick that evening and Javick told her there was no work. On May 29, Javick tried to call McGrady at her school but she was absent. Javick also tried to call her at her home but she was not there. Two other part-time employees were hired on May 29 and McGrady apparently returned to work on June 2 after missing 4 days of work.

The evidence set forth above does not establish that McGrady was laid off for discriminatory reasons. McGrady was not a leader in the union effort. There is no evidence of union animus directed towards her or of Respondent's knnwledge that she had signed a union card. Any evidence based on the overheard conversation between Javick and another employee would be speculative since the conversation did not involve McGrady's union activities. Nor was McGrady questioned with the other employees on May 28. Two employees were hired on May 29, but this does not establish a discriminatory motive for not permitting McGrady to work on May 28. McGrady herself returned after missing only 4 days of work. She then broke her leg, and, after she recovered, returned to work once more. She then quit her employment. Respondent's benign treatment of McGrady after she returned to work in June belies any inference of wrongdoing in late May. At best, the evidence submitted by the General Counsel raises a suspicion that McGrady may have been laid off for a reason—lack of work—which was refuted by the hiring of two part-time employees. But this is not enough to sustain the General Counsel's burden of affirmatively proving a *prima facie* case of a violation by a preponderance of the evidence. For there is no evidence that the reason for McGrady's layoff was based on her union affiliation.

G. *The Alleged Constructive Discharge of Desiree Evans*

The General Counsel also alleges that Desiree Evans was transferred and harassed and eventually constructively discharged, that is, Respondent forced her to quit her employment on September 9, 1980, because of her union sympathies. The applicable legal principle may be stated as follows:

> There are two elements which must be proved to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities. *Crystal Princeton Refining Company*, 222 NLRB 1068, 1069 (1967).

Desiree Evans began working for Respondent in February 1980 as a full-time folding employee. She signed a union card at the union meeting of May 20. She was elected to the six-person organizing committee and she spoke to two employees before May 28 about signing cards. Neither of these employees signed cards as a result of her solicitation. Desiree Evans was questioned along with other employees on May 28, and, although she gave a mildly affirmative response, a question mark appeared after her name on the polling sheet used by Mary Goff to assess the union sympathies of employees. According to Carol Gross, Jim Murdock identified three people as union supporters "Susan, Louise, Sharon and the rest he just referred to as the followers." I have also found that Desiree's sister, Michele, was not hired in late May for discriminatory reasons.

There is no evidence that any management representative spoke to Desiree Evans about the Union between late May and August 27, 1980, at which time Desiree was moved downstairs by Jim Murdock. She asked him why she was being moved, and he replied "there was work to be done downstairs."

Carol Gross testified that a "couple of days" before Evans was moved downstairs she overheard the following conversation:

> I was sitting at my machine. There's a small table by the machine and I was putting stickers and Jim came out of the office really fast and Helen was standing at a table down a little further and when he started up the aisle, he yelled, "That was Desiree on the phone" and Helen started walking towards Jim and Jim said, "She's saying that you told her I was going to hire her sister and I didn't hire her because of the Union and that's what she's telling the Labor Board." And Helen said, "She's a goddamn liar" and he said, "I thought so," he says, "I'm bringing her down here and I'm going to keep an eye on her."

Although Gross' testimony on this point was uncontradicted and undisturbed on cross-examination, its inherent reliability is suspect. For example, if, indeed, Desiree had called Jim Murdock and talked to him about the charge that her sister had been discriminated against, it would seem that Desiree would have testified about this conversation and established the date of the conversation. The timing of this alleged conversation *vis-a-vis* the transfer of Desiree would, after all, be crucial to the General Counsel's case. However, Desiree did not testify about any such conversation. Nor does it seem plausible that such a conversation occurred or that it occurred a "couple of days" before Desiree's transfer downstairs on August 27, as testified. The complaint alleging the refusal to hire Desiree's sister issued some 3 weeks before the transfer. Gross' testimony strikes me as a reflection of what Gross believed was the reason for the transfer of Desiree rather than an accurate reflection of the facts as she heard and observed them.

The General Counsel, in apparent recognition of the implausibility of Gross' testimony, states in his brief that it should be "interpreted as either that Murdock meant that the conversation was about Desiree or that he said the conversation was about Desiree and Gross misperceived his exact words." Findings cannot be based on such speculation. Obviously,if Gross misperceived what was said in one part of the conversation, she could have misperceived other parts of it. I have credited parts of Gross' testmony but I have not credited other parts of it. On this issue I do not find her testimony reliable.

Evans apparently worked downstairs on August 27, as well as Thursday and Friday of that week. The following Monday was Labor Day, a holiday. Desiree did not come into work on Tuesday and Wednesday, September 2 and 3.

On September 4, 1980, Jim Murdock wrote a letter to Desiree which was delivered to her the next day and read as follows:

> This letter is to inform you that your performance on the job at Delta Hosiery has been unsatisfactory in several areas.
>
> You have been tardy, absent without excuse and unresponsive to requests for improvement in your work habits.
>
> It is expected that you call in to report off from work. If you are off more than one day, we expect you to call in and let us know when you expect to return to work.
>
> Desiree, you have been warned verbally and in writing as to the above. Further incidents will result in your suspension from work for one day without pay. Any further incidents will result in your discharge from Delta Hosiery.
>
> I sincerely hope that this letter will cause you to improve in those areas mentioned and that further disciplinary action will not be necessary.

Desiree worked downstairs on Thursday and Friday, September 4 and 5, and on Monday, September 8. During this period, Murdock complained about her production and her absenteeism. Desiree testified that before August 27, 1980, she had not received such complaints. She also testified that the day after she was moved downstairs, Murdock started "yelling at me about my production and of my taking off days from work . . . ." She told him she was "really trying" and "he started mumbling some stuff . . . ." According to Desiree, he also directed that she stay at her seat and that she be kept supplied with material.

Carol Gross testified that, at one unspecified point in time, she heard Jim Murdock "screaming about [Desiree Evans'] time off." He insisted upon warning her in the presence of "Sharon and Suzanne," presumably Sharon Ritinger and Suzanne Evans, employees Murdock regarded as leaders in the union movement. Suzanne Evans, no relation to Desiree, testified that, on September 8, the day before Desiree quit, Murdock showed her the production records of Desiree to demonstrate that Desiree's production was low. When Suzanne asked why he was showing her these records, Murdock said, "Well, you're [the] speaker, aren't you." Suzanne also testified that she was aware that Desiree had received oral warnings for low production before September 8, although she did not specify when these were given. Suzanne also testified that other employees were given oral warnings for low production, a fact confirmed by other witnesses.

On September 9, Desiree worked 1 hour before punching out and quitting. Desiree testified that, on September 9, Jim Murdock again complained about her production. He said that the next time her production slipped or she missed another day she would be sent another notice, and that, if this happened again, she would be "out." She responded that she was trying and that the work downstairs was hard. Murdock said "if it wasn't for your sneezing and coughing all the time, you could do more." Carol Gross basically corroborated Desiree's testimony on this point although she could not hear all of the conversation. She testified that Desiree said she "couldn't help her production if it was down."

Later in this conversation Desiree testified that the following occurred:

> Well, while he was yelling at me, he also said to tell Ted Gatto, your Union man about this for all he cares and I said to him, I know why you're doing this to me and he said, why, and I said—wait—I told Jim I know why you're doing this to me and he said why and I said, I found out about your part of the Union or something like that and he said that isn't why, we don't even have a vote here, something like that.

On cross-examination, Desiree testified as follows: She said "I know why you're doing this to me." Murdock said, "why?" and Desiree said that he had found out that she was a union supporter. Murdock responded, "no, no, something about you don't have a vote and you could tell Gatto, your union man for all I care." Desiree was unable to remember which came first, the remark about Gatto, or her statement that Murdock was screaming at her because he found out about her supporting the Union. Carol Gross—who did not hear all of the conversation—testified that Murdock was "yelling a lot about the Union, Teddy, go tell Teddy something and then Desiree said, 'I *don't* know why you're doing this to me' . . . and he said, 'why because of that silly Union of your's? You said you don't even have a vote yet, you stupid ass.'" (Emphasis supplied.) Gross was not cross-examined on this point.

My view of the above conversation is that Desiree volunteered that she knew why Murdock was screaming at her and that it was because he found out she was a union supporter. I also believe that he denied this, as Desiree testified on direct. It was only then that Murdock told her that she could tell the union representative, Gatto, for all he cared. It would make no sense for Murdock to have said that she could tell Gatto about her contention that Murdock was mistreating her unless Desiree had implied that the mistreatment was based on her union affiliation and unless that remark came first. On cross-examination Desiree's account of the conversation seemed to support this view. Gross' account is somewhat in accord with Desiree's testimony on direct that the Gatto statement came first, but her testimony is a bit different from Desiree's and does not strike me as a coherent account of the conversation. She also admittedly did not hear all of the conversation. In any event, the testimony on this most crucial exchange was extremely vague. It was insufficient to support the General Counsel's view that it reflected Murdock's desire to punish Desiree because of her union activities.

After the conversation, Murdock walked away. Desiree finished her work, and, about a half hour later, she got up, told Murdock "I have had too much of this" and punched out. In response to Murdock's inquiries, Desiree said she was quitting. During this half-hour period Murdock and Desiree did not speak.

Suzanne Evans testified that, after Desiree had quit, she talked to Murdock and asked, "do you blame her for leaving the way you have been harassing her." According to Suzanne, Murdock said "no" and then "mumbled something and he told me I was next." On cross-examination, Suzanne was extremely confused as to when this incident took place and she even suggested that this had happened more than once. Nor does Suzanne's reference to Murdock having "mumbled" something offer the clarity of context which might render her testimony reliable enough to credit. Suzanne Evans was still employed at the time of the hearing in this case and there is no evidence in the record that Respondent retaliated against her for her union activities even though it is clear that Respondent knew she was a leader in the union effort. The General Counsel made no effort to rehabilitate Suzanne Evans after the considerable doubts about her reliability on this point created by her testimony on cross-examination. I therefore do not credit Suzanne's testimony that Murdock told her that he did not blame Desiree for quitting and that she was next.

Prior to August 27, 1980, Respondent had not issued written warning notices to employees. Since that date, apparently only three were issued, one of which was the September 4, 1980, letter to Desiree Evans. George Murdock testified that for the first few months of a person's employment no production warnings are given because the employee is presumed to be learning his or her job. No employees have been laid off for poor production or absenteeism. However, one person was terminated for poor production.

Desiree had had a number of absences since she began her employment in February 1980. She admitted she was absent a substantial portion of the time. Actually, she worked very few full 40-hour weeks, but this was true of most of the so-called full-time employees, according to Respondent's production records. In addition, in August and September 1980, there were many absences by other employees, as documented in notes kept by George Murdock. Desiree attributed most of her absences to dental appointments. She missed an entire week in July and another in August. Desiree testified that she probably was sick 1 week and on vacation another. She did work 40 hours in the week ending August 30 when she was moved downstairs. The week before she missed most of Tuesday. It is unclear whether this absence was excused or not, although Desiree testified generally that she always had permission for her absences and for leaving work early.

The production records for the week of August 30 do not indicate that Desiree's production was significantly less than that of other employees who worked 40 hours. Indeed, it appears that she topped several other employees. For the other weeks in August when she worked, Evans' production was higher than at least three other employees. It is difficult to compare production records, however, because of the different type of work done by each employee and the different hours worked. For example, some employees folded different types of hosiery and others did boxing or bagging work which is incapable of specificity. The last 2 weeks of her employment Desiree worked 16 and 9 hours, respectively, and it is difficult to compare her production records with other employees. She did, however, miss 2 days of work during this period and there is no specific evidence in the

record as to why she missed those days or whether they were excused.

Two other employees were moved downstairs in July 1980. They remained downstairs doing folding work at the same time as Desiree was working downstairs. A number of employees had been moved between floors in the past. The working conditions downstairs were no different than they were upstairs except that there were less people working downstairs and the tables were set further apart.

According to Desiree, the work she was doing downstairs involved folding control top panty hose instead of the plain panty hose which she folded upstairs. Desiree testified that she had folded control top panty hose "once or twice before." She testified that the latter work was harder but she did not satisfactorily explain how or why it was harder. Actually, it appears that the work of the three folding employees downstairs was the same as the work upstairs. Respondent's production records make no distinction between types of panty hose folded although they do specify three or four other types of hosiery.

The evidence does not preponderate in favor of a finding that Evans was transferred downstairs and forced to quit her employment because of her union activities. I find nothing unlawful or untoward about the August 27 transfer of Evans. Other employees were assigned to work downstairs, including two employees in July just before Evans was transferred. The work was not substantially different than that being performed upstairs. I find no evidence supporting Evans' suggestion that the different type of panty hose she folded downstairs was harder to fold than those she had been folding in the past. She admittedly had folded this type of panty hose once or twice in the past. Nor was Evans considered a leader in the union effort. She was considered at most a follower and Mary Goff had had a question about whether she supported the Union or not. More importantly, 3 months had elapsed since the last union activity, and, in the interim, no one from management had engaged in any conversations with Evans about the Union. Nor did the transfer come on the heels of the complaint, as the General Counsel suggests. It came 3 weeks later. And Carol Gross' testimony about Murdock's reasons for transferring Desiree downstairs was not reliable. In these circumstances, I cannot conclude that the August 27 transfer of Evans to the downstairs work area was discriminatory or in retaliation for her union activities.

Working conditions imposed on Evans after August 27 were not unduly restrictive and they were not imposed for discriminatory reasons. She missed 2 days of work in early September and was issued a warning notice primarily for her absenteeism. Evans did miss these 2 days of work as she had other days earlier in her employment. Nor is there any credible evidence that the September 4 warning was issued because of Evans' union activity. The evidence that Murdock insisted on warning Evans in the presence of the two union leaders does not militate against this finding. Murdock could well have thought that, in the face of a bargaining demand and a Board complaint, he was protecting himself from a charge of discrimination by telling the union leaders that he was disciplining Evans for business reasons. Nor were Murdock's September 9 complaints shown to be based on Evans' union activities. Murdock screamed at Desiree about her production and her absenteeism as he had in the past after her transfer to the downstairs work area. But none of that criticism was shown to be based on her union activities. Desiree had received oral warnings for low production in the past and she told Murdock that she was trying to keep her production up. Murdock apparently was a volatile person who screamed at other employees about low production. His remarks about the Union on September 9 were not indicative of discriminatory motive because they followed Desiree's expressed opinion that he was mistreating her because she was a union supporter. Indeed, it appeared to me that Evans was baiting Murdock and trying to establish a discriminatory motive for alleged misconduct. Thus, the General Counsel has not shown that Respondent was responsible for harassing Evans or making her working conditions intolerable and that Respondent did this because of Desiree Evans' union activities or any other prohibited reason. Accordingly, Desiree's action in quitting her employment was entirely voluntary and not as a result of a constructive discharge in violation of the Act.

H. *The Bargaining Order Request*

The evidence shows that the Union had obtained valid authorization cards from 29 of the 53 employees in the bargaining unit[5] when it asked for recognition on May 28, 1980. Respondent declined to grant recognition and refused to bargain with the Union.

The General Counsel requests a bargaining order to remedy Respondent's refusal to bargain and the unfair labor practices committed in May and June 1980. I do not agree with the General Counsel that a bargaining order should issue in this case.

The standards for determining whether the unlawful conduct found herein requires a bargaining order are set forth in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). There, the Supreme Court held that such an order would be an appropriate remedy for: (1) "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices . . . of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had,'" and (2) "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Court also noted that there was a "third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." However, the Court continued, "[t]here is . . . no *per se* rule that the commission of any unfair labor practice will automatically result in a §8(a)(5) violation and the issuance of an order to bargain." (395 U.S. at 613–615).

[5] I do not count the card of Lisa Everett. No one testified that she signed the card or that she signed the card on any particular date.

I find that the unfair labor practices in this case were not so serious that they cannot be eradicated by traditional remedies or that a fair election cannot be held in the future. The unfair labor practices were committed by Jim Murdock, who is now deceased, and Mary Goff, who was acting under his authority. Goff was an employee who was acting as Murdock's agent in polling employees. Her polling and questioning of employees is not likely to linger. Her remarks to two employees about the possibility of Respondent closing or moving the facility, while coercive, do not have the sting and the lingering effect such threats normally radiate because of Goff's low level in the management hierarchy. The impact of her remarks had some significance at the time they were made because employees believed that she acted with Jim Murdock's blessings in her discussions about the Union. This impact is lessened because of Murdock's death and also because, after the passage of time, a floor lady's statement to two employees about the closure of a plant cannot be regarded in the same light as a similar statement from a high-ranking management official. I cannot believe that employees would view her remarks so seriously after compliance with a cease-and-desist order. The same applies to Murdock's unfair labor practices. Jim Murdock was the person responsible for the decision not to hire Michele Evans and the threat to Carol Gross that her machine might be moved. With his death, I cannot say that the effects of these unfair labor practices cannot adequately be remedied by a cease-and-desist order and a hire and backpay remedy. Nor, for the same reason, do I believe that these unfair labor practices will recur. On balance, I believe that a free election could be held at Respondent's facility after the unfair labor practices herein are remedied by conventional means.

CONCLUSIONS OF LAW

1. By interrogating employees about their union sympathies and those of other employees, by threatening the possible closing or moving of its facility because of the union activities of employees and by threatening the loss of employment because of union activities, Respondent violated Section 8(a)(1) of the Act.

2. By failing and refusing to hire Michele Evans after indicating that she had been hired and should report for work because of her sister's suspected union sympathies, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not otherwise violated the Act.

5. The unfair labor practices committed by Respondent do not warrant the issuance of a bargaining order.

REMEDY

I shall recommend that Respondent be ordered to cease and desist from the unfair labor practices found above and to post an appropriate notice. I shall also order that Respondent offer Michele Evans employment in the same position she would have been employed absent the discrimination against her. It will be further recommended that Respondent be required to make Michele Evans whole for any loss of earnings she may have suffered by reason of the discrimination against her. Such backpay and interest thereof shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, I recommend the issuance of the following:

ORDER[7]

The Respondent, Delta Hosiery, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union sympathies or those of other employees.

(b) Refusing to employ employee applicants because of the union sympathies of their relatives.

(c) Threatening employees with loss of employment or the closing or moving of its facilities because of the union activities of employees.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Make Michele Evans whole for any loss suffered by reason of the discrimination against her and offer her immediate employment in the manner and to the extent set forth in the "Remedy" section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records necessary to compute the backpay and reinstatement rights set forth in the "Remedy" section of this Decision.

(c) Post at its place of business in Wilkes Barre, Pennsylvania, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found herein.